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0000119081

October 26, 2010

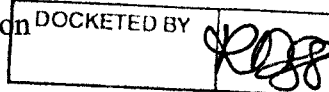
Via Hand Delivery

Hon. Lyn Farmer
Chief Administrative Law Judge
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Arizona Corporation Commission

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OCT 26 2010



AZ CORP COMMISSION
DOCKET CONTROL

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Re: In re Radical Bunny (S-20660A-09-0107)

Dear Judge Farmer:

We represent Mr. Robert Kant, a shareholder at Greenberg Traurig LLP. The Arizona Corporation Commission ("Commission" or "ACC") has caused a subpoena for testimony to be served on Mr. Kant in the above-referenced proceeding ("Proceeding"). See Attachment 1. We write to bring to your attention an issue concerning Mr. Kant's testimony, which ACC counsel has stated is currently scheduled to take place on November 3, 2010. Because Mr. Kant cannot testify substantively about the matters pertinent to the Proceeding due to his ethical obligations, we ask that the Commission excuse his appearance.

Mr. Kant formerly served as counsel for Mortgages Ltd., and his anticipated testimony would relate to that representation. However, the ML Liquidating Trust ("Trust"), the entity that now controls the rights and privileges of Mortgages Ltd., has instructed Mr. Kant not to testify at the hearing concerning not only any attorney-client privileged information, but also any information he learned during the course of his representation of Mortgages Ltd. See Attachment 2. Subject to certain exceptions that we do not believe apply here, Mr. Kant is ethically bound under Arizona Ethics Rule 1.6 not to testify concerning such matters. Mr. Kant intends to follow the instructions of the Trust, as he must, and decline to answer any questions concerning his representation of Mortgage Ltd if called to testify.

Mr. Kant does not have meaningful testimony to provide in this proceeding that does not relate to his representation of Mortgages Ltd.

Judge Lyn Farmer
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We have notified Ms. Julie Coleman, counsel for the Securities Division, of Mr. Kant's circumstance over the telephone and in writing, *see* Attachment 3, but she has not agreed to withdraw the subpoena. *See* Attachment 4. Rather, she continues to take the position that she will call Mr. Kant as a witness at the Proceeding on November 3rd, despite our explanation that he will be unable to testify regarding information he learned while representing Mortgages Ltd. Accordingly, we seek the Commission's intervention to resolve this issue.

Under the circumstances, if Mr. Kant is required to appear on November 3rd, he must and shall decline to testify concerning information he learned while representing Mortgages Ltd—regardless of whether he learned that information through attorney-client privileged communications. Mr. Kant's ethical obligations compel this. The rule governing disclosure of client confidences derives from the ethics rules governing attorneys, and is different in purpose and scope from the rule governing disclosure of the narrower category of attorney-client communications. Arizona Ethics Rule 1.6 ("Rule 1.6), "Confidentiality of Information," states, "[a] lawyer *shall not* reveal information relating to the representation of a client unless the client gives informed consent" or another delineated exception applies.¹ (Emphasis added). Rule 1.6 "applies not only to matters communicated in confidence by the client [*i.e.* attorney-client privileged communications] but also to all information relating to the representation, whatever its source." *See* Comment 3 to Rule 1.6; *Samaritan Found. v. Goodfarb*, 862 P.2d 870, 879 (Ariz. 1993) (in banc) ("[Rule 1.6] is much broader than the attorney-client privilege. It protects all information relating to the representation against even non-compulsory disclosure."). Here, as discussed above, when approached about its position with respect to Mr. Kant's testifying in the Proceeding, the Trust instructed Mr. Kant to observe his obligations under Rule 1.6(d) and not disclose information he learned during the course of his representation.

Further, while Rule 1.6(d)(5) does provide that "[a] lawyer *may* reveal such information relating to the representation of a client to the extent the lawyer believes necessary . . . to comply with other law or a final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information," both Comment 15 to Rule 1.6 and Arizona Ethics Opinion 00-11, "Confidentiality; Subpoenas" ("Opinion 00-11"), acknowledge that there is ambiguity regarding what qualifies as a "final order of a court or tribunal of competent jurisdiction" for purposes of Rule 1.6(d)(5). *See also* SG032 ALI-ABA 209 (noting that "[w]hat constitutes a 'final order' of a court or other tribunal of competent jurisdiction is problematic"). In light of this uncertainty, Mr. Kant must decline to answer any questions concerning his representation of Mortgages Ltd., even if directed to do so by the Commission.

Mr. Kant previously disclosed confidential—but not attorney-client privileged—information during an investigative interview by the U.S. Securities and Exchange Commission ("SEC"). There, Mr. Kant informed Mortgages Ltd. of the SEC's request, and Mortgages Ltd.

¹ One such exception—not applicable here—to the general bar against disclosure of client confidences arises where the lawyer seeks to "establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved." Rule 1.6(d)(4).

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authorized him to disclose confidential, but not privileged, matters only in the context of an SEC interview. *See* Attachment 5. As previously noted, the client's successor has specifically withheld that consent to testimony in this proceeding in response to notice. *See* Attachment 2. Further, Mr. Kant's prior testimony in the investigative interview did not "waive" his obligations under Rule 1.6 going forward. Opinion 00-11 states, "[u]nder [Ethics Rule] 1.6, a lawyer is required to maintain the confidentiality of all information relating to representation, regardless of the fact that the information can be discovered elsewhere." The opinion continues, "[i]ndeed, the lawyer is required to maintain the confidentiality of information relating to representation even if the information is a matter of public record." *See also Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 572-73 (2d Cir. 1973) ("[T]he client's privilege in confidential information disclosed to his attorney 'is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources for such information . . .'" (citing H. Dinker, *Legal Ethics* 135 (1953))). Therefore, Mr. Kant's participation in the investigative interview with the SEC has no bearing on his ability to testify as to confidential matters in the Proceeding.

It also bears mention that Mr. Kant's testimony may be cumulative of other evidence in the Proceeding, although we readily acknowledge that you are in a better position to make that determination. *See Alva v. Indus. Comm. of Ariz.*, 750 P.2d 25, 28 (Ariz. Ct. App. 1987) (affirming administrative law judge's decision not to issue a subpoena where testimony sought would be cumulative), *vacated on other grounds* in 750 P.2d 28 (Ariz. 1988). The apparent purpose in calling Mr. Kant is to garner intent evidence that some or all of the Radical Bunny principals were told that their activities violated the securities laws. It appears that Ms. Coleman has already called numerous witnesses to testify as to this issue. Mr. Kant should not be called upon to make disclosures in this proceeding, over the successor to his former client's objection, if you conclude that there is sufficient evidence already in the record. *See Flowers v. State*, 601 So. 2d 828, 831-33 (Ala. 1992) (finding non-reversible error in trial judge's decision to allow attorney to testify where testimony was "unnecessary and cumulative").

To be clear, we are not seeking to quash the subpoena to Mr. Kant. Rather, unless instructed otherwise, Mr. Kant intends to appear at the hearing on November 3rd; however, consistent with his ethical duties, he will not be able to and will decline to answer any questions concerning his representation of Mortgages Ltd., which would seem to be the purpose of his appearance. For the reasons discussed above, as well as to avoid wasting the Commission's time and burdening Mr. Kant, we request that the Commission excuse Mr. Kant from appearing and that it do so prior to November 3, 2010.

Judge Lyn Farmer
October 26, 2010
Page 4

Respectfully submitted,

Martin Galbut /mrg

Martin R. Galbut (Ariz. Bar No. 002943)

Kevin Downey /KH

Kevin M. Downey²

Counsel for Robert Kant

Enclosures

cc: Julie Coleman, Esq. (via hand delivery)
Arizona Corporation Commission
Securities Division
1300 West Washington, Third Floor
Phoenix, Arizona 85007
Counsel for the Commission, Securities Division

Michael LaVelle, Esq. (via hand delivery)
LaVelle & LaVelle, PLC
2525 East Camelback Road, Suite 888
Phoenix, Arizona 85016
Counsel for Respondents

William Scott Jenkins (via hand delivery)
Myers & Jenkins, P.C.
One East Camelback Road
Suite 500
Phoenix, Arizona 85012

Kevin O'Halloran (via e-mail – kevinm@bellsouth.net)
Richard Shaw (via e-mail – rcshaw2@aol.com)
Michael O'Mara (via e-mail – momara@stradley.com)

Counsel for ML Liquidating Trust

² Mr. Downey is currently assembling the materials necessary to complete an application for admission *pro hac vice* to appear in this Proceeding on behalf of Mr. Kant. In the interim, we request that the Commission permit Mr. Downey to appear on Mr. Kant's behalf on a temporary basis, pursuant to Rule 38(a)(3) of the Rules of the Supreme Court of Arizona.

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2
3 **COMMISSIONERS**

4 **KRISTIN K. MAYES, Chairman**
5 **GARY PIERCE**
6 **PAUL NEWMAN**
7 **SANDRA D. KENNEDY**
8 **BOB STUMP**

9 In the matter of:

10 RADICAL BUNNY, L.L.C., an Arizona limited
11 liability company,

12 HORIZON PARTNERS, L.L.C., an Arizona
13 limited liability company,

14 TOM HIRSCH (aka TOMAS N. HIRSCH) and
15 DIANE ROSE HIRSCH, husband and wife,

16 BERTA FRIEDMAN. WALDER (aka BUNNY
17 WALDER), a married person,

18 HOWARD EVAN WALDER, a married person,

19 HARISH PANNALAL SHAH and MADHAVI H.
20 SHAH, husband and wife,

21 Respondents.

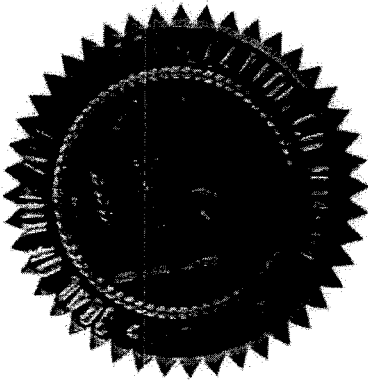
DOCKET NO. S-20660A-09-0107

SUBPOENA

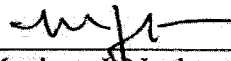
22 **TO: Robert Kant**
23 Greenberg Traurig, LLP
24 2735 East Camelback Road, Suite 700
25 Phoenix, AZ 85016

26 YOU ARE HEREBY COMMANDED, pursuant to A.R.S. §44-1823 to appear at the Office
of the Arizona Corporation Commission, 1200 West Washington, First Floor, Hearing Room No. 1,
Phoenix, Arizona on the 14th day of October, 2010, or any subsequent day or time that the
Administrative Hearing is scheduled, to testify under oath in connection with the Administrative
Hearing in the above-captioned action.

1 DISOBEDIENCE OF THIS SUBPOENA MAY SUBJECT YOU TO FURTHER
2 PROCEEDINGS AND PENALTIES UNDER LAW, INCLUDING, BUT NOT LIMITED TO,
3 CONTEMPT OF COURT.
4



6 The seal of the Arizona Corporation Commission is
7 affixed hereto, and the undersigned, a member of
8 said Arizona Corporation Commission, or an officer
9 designated by it, has set his hand at, Phoenix,
10 Arizona this 23rd day of September, 2010.

11 
12 Matthew J. Neubert
13 Director of Securities
14 Arizona Corporation Commission
15

16 Persons with a disability may request a reasonable accommodation such as a sign language
17 interpreter, as well as request this document in an alternative format, by contacting Shaylin A.
18 Bernal, Executive Assistant to the Executive Director, voice phone number 602/542-3931, e-mail
19 sabernal@azcc.gov. Requests should be made as early as possible to allow time to arrange the
20 accommodation.
21
22
23
24
25
26

LAW OFFICES

Myers & Jenkins

A PROFESSIONAL CORPORATION

One East Camelback Road
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Phoenix, Arizona 85012

William Scott Jenkins

October 13, 2010

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VIA E-MAIL – coberwetter@wc.com
and Regular Mail

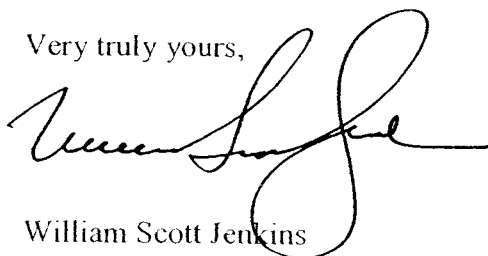
Ellen E. Oberwetter
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005-5901

Re: In re Mortgages Ltd.

Dear Ellen:

This is to acknowledge receipt of your letter dated October 6, 2010 regarding Bob Kant's possible appearance tomorrow at an Administrative Hearing pursuant to a Subpoena issued by the Arizona Corporation Commission in the Radical Bunny matter (Docket No. S-20660A-09-0107). Per your inquiry, be advised that the ML Liquidating Trust expects, and hereby demands, that Mr. Kant protect all client confidences and assert the attorney/client privilege in response to all inquiries relating to his representation of Mortgages Ltd., now known as ML Servicing Co., Inc., and any and all of its affiliates, (collectively, the "Client"), in accordance with his ethical, legal and contractual duties and responsibilities to the Client. Should you wish to discuss this matter further, please feel free to call. I would also appreciate confirmation of your receipt of this letter today. Thank you.

Very truly yours,



William Scott Jenkins

WSJ:ah

c: Kevin O'Halloran (via e-mail - kevinm@bellsouth.net)
Richard Shaw (via e-mail - rcshaw2@aol.com)
Michael O'Mara (via e-mail - momara@stradley.com)

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EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

October 15, 2010

Via Federal Express and E-mail

Ms. Julie A. Coleman, Esq.
Chief Counsel of Enforcement
Arizona Corporation Commission, Securities Division
1300 W. Washington St., Third Floor
Phoenix, AZ 85007

Re: In re Radical Bunny (S-20660A-09-0107)

Dear Ms. Coleman:

As you know, we represent Mr. Robert Kant in the above-captioned matter.

We provided notice of the subpoena served on Mr. Kant to the ML Liquidating Trust, the entity that represents that it controls the rights and privileges of Mr. Kant's former client, Mortgages Ltd. Attached please find the response we received from the ML Liquidating Trust.

Consistent with his professional obligations, Mr. Kant intends to honor the instructions of his former client. He will decline to provide testimony that would reveal information that is either protected by attorney-client privilege or confidential (*i.e.*, any information learned during the course of representing Mortgages Ltd.). See Arizona Rule of Professional Conduct 1.6(a); Arizona Ethics Opinion 00-11.

In light of the instructions given to Mr. Kant by the ML Liquidating Trust, it does not seem that he can provide substantive testimony in this proceeding about the matters at issue. Please advise us as to whether he may therefore be excused from appearing, or of any further developments regarding this issue.

Sincerely,

Kevin Downey / RJH

Kevin Downey

Enclosure

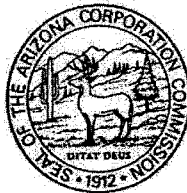
WILLIAMS & CONNOLLY LLP

Ms. Julie A. Coleman, Esq
October 15, 2010
Page 2

cc: William Scott Jenkins (via email – wsj@mjlegal.com)
Kevin O'Halloran (via e-mail - kevinm@bellsouth.net)
Richard Shaw (via e-mail – rcshaw2@aol.com)
Michael O'Mara (via e-mail – momara@stradley.com)

COMMISSIONERS
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MATTHEW J. NEUBERT
DIRECTOR

SECURITIES DIVISION
1300 West Washington, Third Floor
Phoenix, AZ 85007
TELEPHONE: (602) 542-4242
FAX: (602) 594-7470
E-MAIL: securitiesdiv@azcc.gov

ARIZONA CORPORATION COMMISSION

October 19, 2010

Via Electronic Mail and Regular Mail

Mr. Kevin M. Downey
WILLIAM & CONNELLY, LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005-5901


Re: *In re Radical Bunny/S-20660A-09-0107*

Dear Mr. Downey:

Please be advised that the Securities Division is in receipt of your correspondence dated October 15, 2010. As your firm is aware, the Securities Division has never made a request for the waiver of the attorney-client privilege by either Mortgages Ltd. or the ML Liquidating Trust relating to the representation by Greenberg Traurig LLP (including Robert S. Kant) of Mortgages Ltd., now known as ML Servicing Co., nor is it our intention to do so in the future. Furthermore, Mr. Kant provided non-protected substantive testimony during his sworn investigative interview conducted by the Securities and Exchange Commission and this office on or about December 17, 2008, the transcript of which was provided to you on May 24, 2010. Based on the Securities Division's investigation, Mr. Kant's testimony is relevant to the contested legal and factual issues in these proceedings.

Accordingly, it is the intention of the Securities Division to require that Mr. Kant provide testimony at the administrative hearing during the week of November 3, 2010, in accordance with the subpoena issued on September 23, 2010. Should you desire to appear ad hoc vice on behalf of your client, please refer to Rules 31 and 33, Rules of the Arizona Supreme Court. You may obtain a copy of rules 31 and 33 at azcourts.gov/rules.

In the interim, if you should have any questions, please feel free to contact me.

Sincerely,

Julie A. Coleman
Chief Counsel of Enforcement

c: Matthew J. Neubert, Director

Greenberg Taurig

Brian J. Schulman
Tel. 602.445.8407
Fax 602.445.8100
schulmanb@gtlaw.com

November 6, 2008

Via Email

Richard Feldheim
President
Mortgages Ltd.
4455 East Camelback Road
Phoenix, AZ 85018

Re: SEC Interview of Bob Kant

Dear Rich:

This letter confirms that Mortgages Ltd. has no objections to Bob Kant granting the SEC's request for an interview in connection with its investigation of Mortgages Ltd., except that the company has not waived any attorney client or work product privileges. Mortgages Ltd. otherwise does not object to Bob providing the SEC with testimony concerning the work he has performed for the company or any other matters that do not invade the attorney client or work product privileges.

The interview currently is scheduled for November 7, 2008 at the offices of Greenberg Taurig. We are advised that Julie Coleman from the Arizona Securities Division also will be in attendance.

I will contact you after the interview. If you have any questions, please do not hesitate to contact me.

Very truly yours,

GREENBERG TRAUIG, LLP



Brian J. Schulman

BJS/cf

cc: Robert S. Kant

PHX 328,482,362v 1

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